between the accident and the employment, which would support a claim for compensation. If, however, as in the bicycle case, the workman is engaged at the time of the accident in the actual work for which he is employed, it will not defeat his claim that the accident was in its character an ordinary street accident. In the present case there is a causal relationship between the employment and the accident and the claim is not defeated because any person using the stairs in the ordinary way might have slipped with the same consequential injury."

The cases show that the method of the workman's progression – whether on foot, on a bicycle or on a public or other vehicle – is of no importance provided the risks are incurred while doing the work he is employed or authorised to do. In considering the means of his progression the only question appears to be whether in adopting those means he was acting with the knowledge or acquiescence of his employer: *Pierce* v. *Provident Clothing & Supply Co.*;[15] *M'Niece* v. *Singer Sewing Machine Co.*[16] and *Butt* v. *Provident Clothing & Supply Co.*[17]

In the instant case, if as found by the Court below, the defendant driver was on his way home for lunch when the collision occurred, he was then driving a vehicle – something he was employed to do – and when he went for lunch he was doing something not only with the knowledge of his employer's representative, namely, his head of department, but in fact, upon specific instructions.

I therefore have no hesitation in holding, having regard to the circumstances as a whole, that at the moment of collision, the defendant driver was driving the motor vehicle concerned as servant or agent of the Government within the meaning of the authorities and, it accordingly is vicariously liable for his admitted negligence in such driving.

Accordingly, the appeal is allowed, the order of the learned President dismissing the claim against the Government is set aside and I substitute in its place judgment for the plaintiff in the sum of nine thousand and eighty-two dollars and eighty-six cents ($9,082.86) these being the agreed damages. The defendant driver will also have the costs both here and in the Court below and a refund of the deposit paid by way of security for costs of the appeal.

Appeal allowed.

Solicitors: *Mogan & Co.*

MALAYSIAN AIRLINE SYSTEM BHD. v. MALINI NATHAN & ANOR.

[A.C.J. (Wan Hamzah S.C.J.) April 5, 1985]

[Kuala Lumpur – Civil Appeal No. 43 of 1982]

Contract – Flight ticket booked for 1st plaintiff – No seat for 1st plaintiff on scheduled flight – Claim for damages – Whether carrier liable – Condition 9 of Conditions of Contract.

Tort – Negligence – Booking in name of "Malini Nathan" – Ticket in name of "Nathan Malini" – Rejection of name Nathan Malini by defendant's computer – No seat on scheduled flight – Claim of damages – Whether defendant liable – Carriage by Air Act 1974 – Warsaw Convention, arts. 3(2) & 19.

Carriers – Air Carriage – Conditions of contract – Carriage by Air Act, 1974 – Warsaw Convention, arts. 3(2) & 19.

The 1st respondent in 1976, then a 14-year-old pupil in England, was booked to return to Kuala Lumpur for a return ticket for her to depart from London Heathrow Airport by the defendant's flight No. MH 893 on March 26, to arrive at Kuala Lumpur on the 27th. At the London Airport, the plaintiff was told by the defendant's representative that there was no seat for her on MH 893. She was offered accommodation in a London hotel and the defendant eventually arranged for her to fly by BA930 on the 27th and she arrived at Kuala Lumpur on the 28th. The solicitors for the 2nd plaintiff wrote to the defendant to complain about the incident and threatened to sue for damages for negligence. The defendant denied liability and hence the plaintiff brought this action, alleging breach of contract and negligence in that, *inter alia*, the defendant fed the wrong information "Nathan Malini" into the computer and failed to make out that "Malini Nathan" and "Nathan Malini" was the same person, *i.e.* the 1st plaintiff. The plaintiffs claimed they had suffered loss and damage and the 2nd plaintiff suffered nervous shock and required medical treatment. The plaintiffs relied on Article 19 of the Warsaw Convention as amended at the Hague, 1955 (applicable to Malaysia from December 19, 1974 by the Carriage by Air Act 1974) reading as follows: "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo." The defendant denied liability. The Sessions Court gave judgment in the sum of $1,500 for the 1st plaintiff and $500 for the 2nd plaintiff, with an interest at 6% p.a. and costs.

The defendant appealed to the High Court. The principal issues were whether the defendant had breached the contract of carriage and whether it was negligent as alleged. The defendant relied on Condition No. 9 under the Conditions of Contract printed on page 2 of the ticket reading as follows:

"Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of neces-

sity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections."

Held, allowing the appeal: (1) the defendant's decision not to carry the 1st plaintiff on flight MH893 on March 26 was fully covered by condition No. 9. Therefore there was no breach of contract by the defendant. Confirmation or representation by it was made subject to condition No. 9 and it cannot be said that such confirmation or representation was made falsely or recklessly;

(2) the booking was made in Kuala Lumpur in the name of "Malini Nathan" and the ticket was issued at request made in London in the name of "Nathan Malini", which the defendant's computer rejected. Even if it was true that the 1st plaintiff gave her name as Malini Nathan at the checking-in counter and the representative of the defendant failed to manipulate the computer accordingly, the defendant would still be absolved from liability for negligence in view of condition No. 9;

(3) article 19 of the Warsaw Convention should be read subject to article 3(2). One of the conditions stated therein was Condition No. 9. The appealed is allowed with costs here and below.

CIVIL APPEAL.

Chin Yew Meng (*Yahya bin Abdul Rahman* with him) for the appellant.

Joginder Singh for the respondents.

Cur. Adv. Vult.

Wan Hamzah S.C.J.: This is an appeal against the decision of the President of the Sessions Court in Kuala Lumpur Special Sessions Court Civil Action No. 2552/1977. In 1976 the first plaintiff in that action was attending school at Cheltenham in England. Her parents were living in Kuala Lumpur. She was then 14 years old. In that year she was going to have school holidays beginning in March and she was to come back to Kuala Lumpur to spend the holidays with her parents. Her mother (the second plaintiff) booked at Kuala Lumpur for a return ticket for her to depart from Heathrow Airport London for Kuala Lumpur by Malaysian Airline System flight No. MH 893 on March 26, and to arrive in Kuala Lumpur on the 27th. On 26th the first plaintiff went to Heathrow Airport London to check in at the appointed time. At the Airport she was told by the M.A.S. representative that there was no seat for her on flight No. MH 893. The plane departed and she was left behind. She was off-loaded together with three other children. M.A.S. representative offered to her accommodation at Sheraton Hotel, London, while arrangement was made for her departure to Kuala Lumpur by the next available carrier. But she preferred to go and stay with one Dr. Syed Mahmood and his wife who were then at the Airport to send off their children. At Dr. Syed Mahmood's house the first plaintiff spoke on the phone to her parents in Kuala Lumpur and informed them of what had happened. Her parents agreed that she should take the next available British Airways flight the next day. Eventually by arrangement made by M.A.S. the first plaintiff left London on the 27th by British Airways flight No. BA 930 and arrived in Kuala Lumpur on the 28th.

On April 10, 1976 solicitors for the second plaintiff wrote to the General Manager of the Malaysian Airline System Berhad (the defendant) in Kuala Lumpur to complain about the incident in London, and to inform about what happened to the second plaintiff at Kuala Lumpur as a result of the incident as follows:

"While all this transpired in London, our client and his wife were not kept informed by MAS of the change in flight. It was only after several hours of distress and anxiety that they were informed by a direct phone call from their daughter on her own initiative. This phone call was received at about midnight on 26/3/76 informing her parents of the delay. Mrs. Nathan was terribly upset and worried for the safety of her daughter in the care of person or persons unknown to her and she did not sleep the whole night. It upset her so badly that she did not eat for the whole of the following day that is March 27.

Then at about 8 p.m. on March 27 Mrs. Nathan was found missing from home. Dr. Nathan contacted all his friends to locate her whereabouts but in vain. At about midnight he rang up the hospitals and hotels in town. At 3 a.m. on the 28th he rang up the police station at Jalan Travers and at 3.30 a.m. he went to the police station and met Inspector Del Akbar. The mobile police was alerted but till morning they still drew a blank as to her whereabouts.

At about 7 a.m. that morning, when Dr. Nathan was walking around his area in search for his wife, a boy approached him to say that there was a lady sleeping in an unoccupied house in the vicinity. The lady turned out to be Mrs. Nathan who appeared to be suffering from amnesia and shock. Dr. Nathan then sent her to a doctor for treatment and care as he was himself bordering on a physical and nervous breakdown after the traumatic events which took place.

You will no doubt appreciate that both parents and child suffered much distress and anguish as a result of your neglect."

The solicitors stated further that they had been instructed to sue for damages for the defendant's negligence, and enquired whether the defendant wished to give an explanation and whether the defendant was prepared to offer any reasonable compensation. The defendant Company sent a reply to the solicitors dated June 11, 1976, denying liability. Hence the plaintiffs brought the action contending as follows:

(1) the defendant had confirmed that the first plaintiff had

a definite and certain booking of a seat on the MAS flight No. MH 893 but the defendant in breach of the warranty and/or contractual obligation failed and/or refused to carry the first plaintiff on the said flight;

(2) in the alternative, the representation by the defendant that the first plaintiff had a definite and certain booking of a seat on the said flight was made fraudulently, in that the defendant knew that it was false, or was made recklessly not caring whether it was true or false;

(3) in the further alternative, the defendant's statement confirming a definite and certain booking of a seat on the said flight for the first plaintiff was false and was made recklessly by the defendant either well knowing that it would not be honoured or without caring whether or not it would be honoured;

(4) in the further alternative the failure and/or refusal of the defendant to carry the first plaintiff on the said flight was due to the defendant's negligence, particulars of which were stated as follows:

(a) not checking their passenger list well in advance of March 26, 1976 to ensure that the first plaintiff would have a definite seat on the said flight;

(b) confirming that the first plaintiff had a definite and certain booking of a seat on the said flight when there was none available;

(c) overbooking passengers on the said flight;

(d) refusing to carry the first plaintiff in preference to other adult passengers;

(e) feeding wrong information – "Nathan Malini" into the computer;

(f) failed to make out that "Malini Nathan" and "Nathan Malini" was the same person, namely the first plaintiff.

It was further contended in the Statement of Claim that by reason of the matters complained therein the plaintiffs had suffered loss and damage, and that on hearing of the first plaintiff's plight over the telephone the second plaintiff suffered nervous shock and required medical treatment and thereby suffered loss and damage. Particulars of the nervous shock were stated.

The defendant denied liability. With reference to the various particulars of the alleged negligence the defendant pleaded as follows:

Parriculars (a): This was denied.

(b): This was denied.

Particulars (c): It was a normal practice of airlines to overbook during peak periods.

(d): This was caused by or contributed to by the first plaintiff's negligence in that she had mislaid her ticket.

(e) and (f): The confusion was caused by the plaintiffs' agent, MPPM Travel Secretarial London, who had requested the defendant to issue the ticket in the name of "Nathan Malini" instead of "Malini Nathan" as she was booked in Kuala Lumpur, and the reservations card being reflected in the name of "Malini Nathan" the computer kept rejecting the name "Nathan Malini". This would not have arisen if the defendant were not misled by the plaintiffs' said agent.

The defendant also pleaded as follows:

(i) even if it was true that the defendant had confirmed a definite and certain booking of a seat on the said flight for the first plaintiff (which was denied), no contract of carriage could be made until the first plaintiff presented her ticket at the London Airport for the purpose of being allotted a seat on the said flight; and

(ii) even if the defendant has warranted that the first plaintiff had a definite and certain booking of a seat on the said flight (which was denied), the defendant contended that at the London Airport the first plaintiff was informed by the defendant that she would not be carried on the said flight and the refusal to carry the first plaintiff had prevented the making of a contract of carriage;

(iii) if a contract of carriage was made (which was denied), the conditions of contract on page 2 of the ticket and the important notices on pages 3, 5 and 6 would apply and the defendant relied on all the conditions of contract. The defendant also relied on the General Conditions of Carriage;

(iv) the first plaintiff had no remedy at law as she was provided with alternative transportation by the defendant, and her acceptance and use of rerouted ticket provided by the defendant constituted liquidated damages and she was barred from seeking further damages;

(v) the loss and damage alleged to have been suffered by the second plaintiff (which was denied) were too remote.

The President of the Sessions Court gave judgment in the sums of $1,500 for the first plaintiff and $500 for the second plaintiff, with interest at 6% per annum and costs. The defendant appeals against the judgment.

I would like to deal first with the defendant's contention (iii) above. Condition No. 9 under the Conditions of Contract printed on page 2 of the ticket is in the following terms:

"Carrier undertakes to use its best efforts to carry the passenger and baggage with reasonable dispatch. Times shown in timetables or elsewhere are not guaranteed and form no part of this contract. Carrier may without notice substitute alternate carriers or aircraft, and may alter or omit stopping places shown on the ticket in case of necessity. Schedules are subject to change without notice. Carrier assumes no responsibility for making connections."

In my judgment the defendant's decision not to carry the first plaintiff on flight No. MH 893 on

March 26, was fully covered by condition No. 9. What the defendant did or omitted to do was in accordance with condition No. 9, and therefore there was no breach of contract on the part of the defendant. The plaintiffs ought to have known condition No. 9 and they were presumed to have known it as it was printed on the ticket. Even if it was true that the defendant had confirmed or represented to the plaintiffs that the first plaintiff had a definite and certain booking of a seat on that flight, it must be understood that such confirmation or representation was made subject to condition No. 9. Because it was made subject to condition No. 9 it cannot be said that such confirmation or representation was made falsely or recklessly.

I have disposed of the plaintiffs' contentions (1), (2) and (3). I shall now consider their contention (4). As regards the particulars of negligence in contention (4) –

(a) there was no evidence to show that the defendant did not check the passenger list in advance;

(b) as already stated, if there was confirmation that the first plaintiff had a definite and certain booking of seat such confirmation was made subject to condition No. 9;

(c) in view of condition No. 9 and the fact that all intending passengers were presumed to have notice of condition No. 9, it would not be an act of negligence on the part of the defendant to allow overbooking;

(d) in view of condition No. 9, it would not be an act of negligence on the part of the defendant to carry other passengers in preference to the first plaintiff.

As regards the particulars of negligence (e) and (f), reference has already been made to the defendant's allegation in the Statement of Defence that when booking was made in Kuala Lumpur it was made in the name of "Malini Nathan". There was no Reply filed by the plaintiffs to deny this allegation. Therefore it must be taken as an undisputed fact that the booking was made in Kuala Lumpur in the name of "Malini Nathan". The letter dated March 17, 1976 (at page 12 in the Agreed Bundle of Documents) was a request from MPPM Travel Secretarial, London, to MAS for the issue of tickets for eight students, one of whom was "Miss Nathan, Malini". In the absence of other evidence to the contrary it should be accepted that pursuant to the request a ticket was issued in the name of Miss Nathan, Malini. As already stated, the defendant alleged in the Statement of Defence that the computer kept rejecting the name Nathan Malini. If the ticket was produced at the checking-in counter, naturally the name on the ticket, *i.e.* Nathan Malini, would be fed into the computer; and in view of the name Malini Nathan being recorded in the Kuala Lumpur reservation, the computer would naturally reject. But when giving evidence the first plaintiff stated that she gave her name as Malini Nathan, at the checking-in counter, implying that the name Malini Nathan should have been fed into the computer by the MAS representative and that if this was done the computer would confirm that there was a seat reserved for the first plaintiff on the flight. But the President in his Judgment did not state whether he accepted the first plaintiff's allegation that she gave the name Malini Nathan at the checking-in counter. In fact the President did not deal at all with the issue raised by the plaintiffs in particulars of negligence (e) and (f) and did not make any specific finding on that issue. Unless there is a specific finding by the President that he accepted that allegation I do not think that there can be a proper finding of negligence under particulars (e) and (f). Moreover, even if it was true that the first plaintiff gave her name as Malini Nathan at the checking-in counter and the MAS representative failed to manipulate the computer accordingly, the defendant would still be absolved from liability for negligence in view of the condition No. 9.

The President of the Sessions Court found that there was a contract between the parties and that the defendant had breached the contract by failing to carry the first plaintiff on flight No. MH 893. In his judgment he stated: "To my mind, to confirm a seat on flight is a definite statement of fact whatever is stated in the ticket". In my view the confirmation of a seat must be understood to be subject to the said condition No. 9. No claim can succeed on the basis of confirmation of a seat, especially in the present case where evidence shows that all confirmations were made before the issue of the ticket. According to the evidence of the second plaintiff the last confirmation was made two weeks before the scheduled flight on March 26, whereas the letter dated March 17 at page 12 of the Agreed Bundle of Documents shows that the ticket must have been issued less than ten days before the scheduled flight. The ticket with the condition No. 9 printed on it must be taken to have varied all confirmations made before it was issued.

In his judgment the President did not consider or make a finding on the issue whether at Heathrow Airport the first plaintiff produced her ticket to the MAS representative. When giving evidence the first plaintiff did not say categorically that her ticket was produced. She stated:

"My ticket was brought by one of Dr. Mahmood's children by mistake. Dr. Mahmood's children got seats in the plane. In Kuala Lumpur M.A.S. made out a new return ticket for me.... I have got my ticket back at London Airport."

The Warsaw Convention as amended at The Hague, 1955 has been made applicable to Malaysia as from December 19, 1974 by the Carriage by Air Act 1974 of Malaysia. The plaintiff purported to rely on Article 19 of the Convention which is in the following terms:

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo."

In my judgment Article 19 applies in a case where under the contract of carriage the time for the carriage is fixed. I have already shown that in the present case time for the carriage was not fixed in view of Condition No. 9 printed on the ticket, which provides, *inter alia*, "Times shown in timetables or elsewhere are not guaranteed and form no part of this contract." Article 19 should be read subject to Article 3(2) which provides –

"The passenger ticket shall constitute *prima facie* evidence of the conclusion and *conditions* of the contract of carriage."

I emphasize the word "conditions" in order to lay stress on the point that the carriage is subject to the conditions stated in the ticket. In the present case one of those conditions was Condition No. 9.

The appeal is allowed and the President's judgment is set aside. The plaintiff's claims are dismissed. Costs to the appellant (the defendant) here and in the court below.

Appeal allowed.

Solicitors: *Tahir & Salleh; Joginder Singh & Co.*

W.E. BALASINGAM v. THE BAR COUNCIL

[A.C.J. (Wan Hamzah S.C.J., Harun & Zakaria Yatim JJ.) April 12, 1985]

[Kuala Lumpur – Originating Motion No. A33 of 1984]

Legal Profession – Advocate and solicitor – Conviction under ss. 109 & 409, Penal Code (F.M.S. Cap. 45) – Disciplinary Committee appointed – Appellant struck off the Roll – Appeal – Conduct of advocate and solicitor in his professional capacity – Appeal record not before Disciplinary Committee – Fresh inquiry – Penal Code (F.M.S. Cap. 45), ss. 109 & 409 – Legal Profession Act, 1976, ss. 93(2) (a), 100, 100(1) & 101(1) – Advocates and Solicitors (Disciplinary Enquiry) Procedure Rules 1970, r. 10.

Penal Code, ss. 109 & 409.

The appellant, a practising advocate and solicitor, was convicted in the Sessions Court under sections 109 and 409 of the Penal Code with abetting the commission of criminal breach of trust in respect of a sum of $29,500. He was sentenced to six months' imprisonment and a fine of $20,000. His appeal to the High Court was dismissed. Subsequently a Disciplinary Committee appointed by the Chief Justice to hold a formal inquiry under section 100 of the Legal Profession Act made an order that the appellant be struck off the roll of advocates and solicitors. He now appeals against that order on six grounds, among them that the Disciplinary Committee failed to fully appreciate the facts that the conviction of the appellant did not touch upon the conduct of the appellant as an advocate and solicitor and that the Committee was not in possession of the appeal record of the Sessions Court.

Held: (1) it was not open to the Disciplinary Committee to go behind the conviction to ascertain whether the conviction was justified. The conviction was final in that the appeal against the conviction was dismissed, and therefore it was a conviction within the contemplation of section 93(2);

(2) it is not every kind of misconduct of the advocate and solicitor which the Disciplinary Committee should be concerned with but only misconduct committed in his professional capacity. The provisions of section 100(1), added by Act A567, came into force since December 16, 1983 and are inconsistent with the provisions of section 93(2) (a), which should be read subject to section 100(1), so that the words "a criminal offence as makes him unfit to be a member of his profession" appearing in section 93(2) (a) should be read and understood to mean a criminal offence committed in his professional capacity;

(3) for the reason that the Disciplinary Committee made the enquiry without the appeal record before it, its decision and order should be set aside and this case should be sent back to the Committee to hold a fresh inquiry. The Sessions Court appeal record and the High Court judgment should be made available to the Committee for the purpose of the fresh inquiry;

(4) it was not proper and correct for the Committee to arrive at a finding of instigation, conspiracy and aiding without the proper record of evidence before it.

ORIGINATING MOTION.

C. Navarednam for the appellant.
Ong See Seng for the respondent.

Cur. Adv. Vult.

Wan Hamzah S.C.J. (delivering the Judgment of the Court): Williams Ernest Balasingam, a practising advocate and solicitor, was convicted in the Ipoh Sessions Court under sections 109 and 409 of the Penal Code with abetting the commission of an